No. SC99185

IN THE SUPREME COURT OF MISSOURI

STEPHANIE DOYLE, *ET AL*.,
Appellants,

vs.

JENNIFER TIDBALL, *ET AL*.,
Respondents.

On Appeal from the Circuit Court of Cole County, Missouri
Case No. 21AC-CC00186
The Honorable Jon Beetem

BRIEF OF THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY (FGA) AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is being filed with the consent of all parties.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Regulations

Other

JURISDICTIONAL STATEMENT

Amicus adopts the jurisdictional statement as set forth in Respondents' brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Foundation for Government Accountability (FGA) is a nonpartisan, nonprofit organization that helps millions achieve the American dream by improving welfare, work, and healthcare policy at both the state and federal levels. Launched in 2011, FGA promotes policy reforms that seek to free individuals from the trap of government dependence, restore dignity and self-sufficiency, and empower individuals to take control of their futures.

Since its founding, FGA has helped achieve more than 400 policy reforms in 34 states that removed government barriers to opportunity and helped millions of individuals move off welfare. FGA supports its mission by conducting innovative research, deploying outreach and education initiatives, and equipping policymakers with the information they need to achieve meaningful reforms. FGA recently filed an amicus brief with the United States Supreme Court in *Gresham v. Azar*, which focused on Medicaid and work requirements.

Extensive research, including research conducted by FGA, has shown that Medicaid expansion costs routinely exceed the initial projections made by proponents consuming more than 30 percent of state-budgets nationwide while failing to provide the promised benefits. As a result, state funds that might have been used in more meaningful ways are consumed by a program that studies have shown can actually reduce access to high quality care while shifting scarce resources away from the truly needy such as the disabled and poor families with young children, giving those benefits instead to able-bodied adults without children. FGA’s research and educational outreach strives to introduce policies that enable states to avoid the catastrophic results in healthcare caused by Medicaid expansion, the same results the unfunded and unconstitutional Medicaid

Expansion Amendment[1] would create. Accordingly, this case directly implicates FGA's core mission of helping individuals live healthy, independent, and fulfilling lives.

STATEMENT OF FACTS

Amicus adopts the statement of facts as set forth in Respondents' brief.

STATEMENT OF CONSENT

This brief is being filed with the consent of all parties.

[1] Article IV, § 36(c) of the Missouri Constitution, hereinafter referred to as the "Medicaid Expansion Amendment."

ARGUMENT

I. THE MEDICAID EXPANSION AMENDMENT IS UNCONSTITUTIONAL BECAUSE IT REQUIRES THROUGH PRACTICAL NECESSITY THE APPROPRIATION OF FUNDS NOT RAISED THROUGH THE INITIATIVE IN VIOLATION OF ARTICLE III, SECTION 51 OF THE MISSOURI CONSTITUTION

While significant disagreement exists between the parties here as to the costs and benefits of Medicaid expansion, there are two key facts in which both parties are in complete agreement, and upon these two facts alone the Court may render its ruling.

First, both parties agree that the initiative which led to the creation of the Medicaid Expansion Amendment did not create and then appropriate a revenue source to fund the State's portion of the massive cost of Medicaid expansion. In *Cady*, the Missouri Court of Appeals – Western District held that the initiative at issue did not conflict with the Missouri Constitution's prohibition of appropriation by initiative because "[t]here are no words on the face of the Proposed Measure that appropriate funds." *Cady v. Ashcroft*, 606 S.W.3d 659, 665-667 (Mo. App. W.D. 2020).

Second, there is no dispute as to whether the initiative will impose significant costs upon the State of Missouri. It will. As noted by the circuit court, "[t]he Plaintiffs admit that a supplemental appropriation would be required to fully fund expansion and implicitly request (in their proposed judgment at page 9) such an appropriation…" *Doyle, et. al., v. Tidball, et al.*, 21AC-CC00186, 4 (Mo. Cir. June 23, 2021). The circuit court found that the initiative would initially cost the state at least $1.8 million, while the Missouri State Auditor estimated a cost of more than $200 million. *Id*.; Missouri State Auditor's Office, Fiscal Note 20-063 (May 23, 2019). Whatever the actual cost might be, all parties agree there would be a cost, and all parties agree that the initiative did not include appropriation language and an accompanying revenue source to cover that cost.

Article III, Section 51 of the Missouri Constitution states, in pertinent part, that "[t]he initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this

constitution." Mo. Const. Art. III §51. As this Court made clear in *City of Kansas City v. Chastain*, "[w]hat is prohibited is an initiative that, either expressly or through practical necessity requires the appropriation of funds to cover the costs associated with the [initiative] proposal." *City of Kansas City v. Chastain*, 420 S.W.3d 550, 555 (Mo. banc 2014). Here, as explained above and below, the proposed initiative does not create any revenue that may be used to offset the massive costs to the State of its implementation. As a result, it cannot and did not appropriate the funds necessary to carry out its provisions which included adding approximately 275,000 new enrollees into the State's Medicaid program. Without the ability to carry out its provisions, it cannot remain a part of Missouri's Constitution without violating Article III, Section 51. The Medicaid Expansion Amendment is unconstitutional.

This case is analogous to *McGee*, another case decided by this Court. There, supporters of a proposed law establishing a pension plan made essentially the same argument Plaintiffs do here, namely, that since the ordinance they proposed did not directly appropriate funds, it did not violate Article III, Section 51. *Kansas City v. McGee*, 269 S.W.2d 662, 666 (Mo. 1954). However, as this Court found in *McGee*, even though the ordinance did not directly appropriate money, it would require the government to fund the pension plan in the same way it would have had the ordinance included an appropriation, and it was thus the same as an appropriation for all practical purposes. *Id*. The Court held, "[t]he practical operation of the ordinance yielded a violation of article III, section 51 because the ordinance 'has the same effect as if it read that a sum necessary to carry out its provisions as certified by the trustees shall stand appropriated ....'" *Id*.

Here, while the Medicaid Expansion Amendment does not explicitly appropriate funds to carry out its provisions, those provisions, adding 275,000 new enrollees, cannot be carried out without massive expenditures by the State. In other words, commanding the State to expand Medicaid is no different than commanding the General Assembly to spend funds, something that cannot be done through initiative. Since the Medicaid

Expansion Amendment does not create any new funding sources, it has no funds to appropriate. Thus, the Medicaid Expansion Amendment is unconstitutional.

As the circuit court eloquently stated, "the Missouri Constitution provides that people, by initiative, may only spend or appropriate the revenues that they raise in the initiative," and since this initiative "requires the appropriation of revenues not created by the initiative" it is unconstitutional. *Doyle, et. al., v. Tidball, et al.*, 21AC-CC00186, 4 (Mo. Cir. June 23, 2021). This rule is not only compelled by the Missouri Constitution but reflects sound fiscal policy. If funds could be appropriated by initiatives without any offsetting revenue streams, then proponents of such measures could seek to implement massive, unfunded spending programs without having to address the difficult trade-offs about how those funds would be raised (e.g., tax hikes, offsetting spending cuts, etc). Article III, Section 51 exists to prevent exactly this scenario, and the circuit court correctly found that the Medicaid initiative violated this bedrock constitutional rule.

II. THE EVER-GROWING AND UNANTICIPATED COSTS OF MEDICAID EXPANSION WOULD INEVITABLY OVERWHELM AND MONOPOLIZE THE STATE'S BUDGET WITHOUT PROVIDING THE BENEFITS PROPONENTS PROMISE, DEMONSTRATING THE CRITICAL NEED FOR A SUFFICIENT AND DEDICATED REVENUE SOURCE PRIOR TO IMPLEMENTATION

Medicaid exists to offer federal funding to States to assist low-income individuals and families in obtaining medical care. *See* 42 U.S.C. §1396a(a)(10); *Nat. Fed. of Indep. Businesses v. Sebelius*, 567 U.S. 519, 541-42 (2012). The federal funding, however, comes with strings attached. To receive the funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. *Id*. While the federal government contributes financial support for each State's Medicaid program, the States remain responsible for a significant share of the program costs, and that share gradually rises by design once the states are locked into expansion.

Today, Medicaid is often the single largest expenditure of state governments, consuming more than 30 percent of state budgets nationwide.[2] Those expenditures have risen sharply in recent years, increasingly hampering the ability of States to finance other priorities they might consider important, such as public education. *Id*.

Moreover, the Medicaid program allows the federal government to exert significant power over states through its authority to review, and approve or deny, state plans related to Medicaid. For instance, in order to qualify for federal assistance under the Medicaid program, a State must submit to the federal government a "state plan" for "medical assistance," 42 U.S.C. §1396a(a), that contains a comprehensive statement describing the nature and scope of the State's Medicaid program. 42 C.F.R. §430.10. The State Plan must then be approved by the federal Centers for Medicare and Medicaid Services (CMS) before taking effect. 42 U.S.C. §1396a; 42 C.F.R. §430.10. Similarly, to make a change to its existing Medicaid program, a State must first prepare a State Plan Amendment (SPA) and obtain CMS approval. 42 C.F.R. §430.12. Without federal approval, the State is not allowed to make the change.

To date, the States that have chosen to expand their Medicaid programs have faced skyrocketing expenditures on the expansion group—often 50 percent or more above the initial projections.[3] In California, for example, the number of new Medicaid enrollees following the expansion was nearly triple what was initially projected. *Id*.

Besides skyrocketing costs, Medicaid expansion creates a host of other problems by harming the truly needy, reducing access to high quality care, and offering no discernible improvement in health outcomes.

First, Medicaid expansion harms the truly needy. Whereas the initial iteration of the Medicaid program focused on giving care to those who could not fend for

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[2] *See* Nicholas Horton, How Medicaid Is Consuming State Budgets, Foundation for Government Accountability (Oct. 29, 2019), https://bit.ly/38F0ypP.

[3] Brian Blase, Sam Adolphsen & Grace-Marie Turner, Why States Should Not Expand Medicaid, Foundation for Government Accountability & Galen Institute (Oct. 6, 2020), https://bit.ly/3q0C3cF.

themselves—such as the disabled and poor families with young children—the expansion population includes able-bodied adults without children who are far less in need of public benefits. The number of able-bodied adults on Medicaid has exploded over the last two decades. From 2000 to 2018, the number of able-bodied working-age adults enrolled in Medicaid jumped from only seven million in 2000 to 28 million by 2018.[4] By expanding coverage to these individuals, States are diverting scarce resources away from those who need it the most, such as seniors, low-income children, pregnant women, and individuals with disabilities. *Id*.

Second, expanding Medicaid will reduce access to high quality care. Proponents often point to increased coverage as a benefit but what good is more coverage if it is lower quality? Due to complex paperwork, administrative burdens, and low reimbursement rates, many healthcare providers do not accept Medicaid patients at all.[5] Expansion would thus place even more strain on the already overburdened providers who serve such patients, resulting in delays in receiving care and potentially lower quality care for those currently enrolled in the Medicaid program. *Id*.

Third, despite the repeated claims of proponents as to the benefits of expanding Medicaid, to date no reliable evidence exists that would suggest that Medicaid expansion actually improves health outcomes. In fact, available evidence suggests the opposite. For instance, between 2013 and 2017, overall mortality and drug overdose deaths were worse in States that expanded Medicaid than in those that did not.[6] In addition, a pilot program in Oregon in which some uninsured adults were randomly selected by lottery to receive

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[4] Nicholas Horton and Jonathan Ingram, The Future of Medicaid Reform: Empowering individuals through work. Foundation for Government Accountability (Nov. 14, 2017), https://thefga.org/paper/future-medicaid-reform-empowering-individuals-work/.
[5] Kayla Holgash and Martha Heberlein, Physician Acceptance of New Medicaid Patients, Medicaid and CHIP Payment and Access Commission (January 24, 2019), https://www.macpac.gov/wp-content/uploads/2019/01/Physician-Acceptance-of-New-Medicaid-Patients.pdf.
[6] Jonathan Ingram & Sam Adolphsen, How Moving Able-Bodied Adults from Welfare to Work Could Help Solve the Opioid Crisis, Foundation for Government Accountability (Mar. 22, 2019), https://thefga.org/paper/opioid-crisis-medicaid-reform/.

Medicaid benefits found no improvement in health outcomes between those who received the benefits and those who did not.[7] In 2010, a study found that Medicaid patients undergoing a major operation in a U.S. hospital were 13 percent more likely to die in the hospital than the uninsured, and more than twice as likely to die as those with private insurance.[8] Medicaid patients were also more likely to suffer post-operation complications and increased costs and length of stay despite risk factors or the specific major operation underwent. *Id*. Based on the reliable, unbiased data currently available, there is simply no indication that Medicaid expansion actually improves the health of the able-bodied adults that take advantage of it. When it comes to Medicaid expansion, the only outcome that has proven consistent and reliable across the nation is that it will cost the state significantly more than proponents initially claim.

With such high costs and little to no discernible benefit, there is an especially compelling need for accurate upfront funding projections for Medicaid expansion before it is enacted. For those states that wish to move forward with expansion despite the high costs, a dedicated revenue source sufficient to cover the state's portion is critical. Were this Court to reverse the lower court's ruling as to the unconstitutionality of the Medicaid Expansion Amendment passed without a dedicated funding source and rejected twice by the General Assembly (once in 2019, and again in 2021), the State's budget would be decimated, and significant harm would fall on the truly needy people Medicaid was originally designed to help. The lower court's ruling must be upheld.

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[7] Katherine Baicker & Amy Finkelstein, Oregon Health Insurance Experiment, National Bureau of Economic Research (2013), https://www.nber.org/programs-projects/projects-and-centers/oregon-health-insurance-experiment/oregon-health-insurance-experiment-results.

[8] LaPar, Damien, Castigliano Bhamidpati, Carlos Mery, George Stukenborg, David Jones, Bruce Schirmer, Irving Kron, and Gorav Ailawadi. 2010. "Primary Payer Status Affects Mortality for Major Surgical Operations." Annals of Surgery 252(3): 544-551, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3071622/.

III. ALLOWING THIS UNCONSTITUTIONAL AMENDMENT TO SURVIVE WOULD TRANSFORM MISSOURI'S INITIATIVE PROCESS INTO A MECHANISM FOR WELL-FUNDED SPECIAL INTEREST GROUPS TO CIRCUMVENT THE LEGISLATIVE PROCESS, THEREBY CRIPPLING THE STATE'S BUDGET WHILE UNDERMINING THE SEPARATION OF POWERS ENSHRINED IN THE MISSOURI CONSTITUTION

In 2019, after careful debate, the Missouri General Assembly overwhelmingly rejected Medicaid expansion. For most of the legislators the reason was simple: the cost was too high and unpredictable. Several legislators also noted that expansion would potentially swallow up funding for other priorities they wished to support, such as education.

Thus, unable to secure Medicaid expansion through the normal legislative route, proponents of expansion sought to circumvent that process by placing on the August 2020 ballot an initiative calling for a constitutional amendment, the Medicaid Expansion Amendment at issue here. Even though the initiative did not include a funding source, it was allowed on the ballot, and narrowly passed. Unsurprisingly, voters were much more likely to vote for it given that they only saw the purported benefits without being given any information about how the State would pay for the massive *costs* of expansion (e.g., through higher taxes or budget cuts elsewhere).

Now, with the deadline for carrying out the Amendment's provisions fast approaching, the Court is left with the choice of either rendering the Amendment unconstitutional, or, through Court Order, commanding the General Assembly to either fund expansion or abandon its entire Medicaid program altogether. Based on precedent established by this Court, the choice is clear. The Medicaid Expansion Amendment is unconstitutional; the lower court's decision must be upheld.

However, in addition to the arguments outlined above, and after briefly noting the dire consequences of a sudden termination of the State's entire Medicaid program should the State be forced to go that route, it is worth outlining another compelling constitutional

argument that supports striking down this Amendment. Namely, the effect a reversal of the lower court's decision would have on the separation of powers enshrined in the Missouri Constitution.

Missouri's Constitution establishes a clear separation of powers between the three branches of government. Mo. Const. art. II §1 ("The powers of government shall be divided into three distinct departments—the legislative, executive and judicial."). This division of powers "rests on history's bitter assurance that persons or groups of persons are not to be trusted with unbridled power" and "is not meant to promote efficiency but to preclude the exercise of arbitrary power." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc1997), as modified on denial of reh'g (Nov. 25, 1997).

Missouri's separation of powers is also designed in part to address the dangers to liberty stemming from irresponsible government spending. To this end, the Constitution sets out a "complex but logical" budgeting process that allows the General Assembly and Governor to ensure the State lives within its means. *Missouri Health Care Ass'n v. Holden*, 89 S.W.3d 504, 507-08 (Mo. banc 2002). Put simply, "the constitution does not permit the state to spend money it does not have." *Id*. at 506-07.

To this end, the Missouri Constitution vests the power of appropriation solely with the General Assembly, art. III, §36, prohibits executive officers from withdrawing funds or incurring obligations absent an appropriation, art. IV §28, vests a line item veto power in the Governor, art. IV §26, allows the Governor to reduce expenditures below the appropriated amount when actual revenue is less than expected, art. IV §27, and carefully restricts the General Assembly's capacity to incur debt, art. III §37; see also *State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. banc 1975) (the meaning of these provisions "is clear: money may not be withdrawn from the state treasury for any purpose other than that specified in an appropriation law.").

The Missouri Constitution also explicitly prevents the circumvention of these provisions by prohibiting appropriation through the initiative process. *See* art. III §51. As the Missouri Supreme Court has explained, "the dangerous business of making

appropriations by initiative, without regard to other constitutional requirements, or even attempting to set forth the full text of the many constitutional requirements which would be abrogated or rendered nugatory, is generally condemned." *State ex rel. Sessions v. Bartle*, 359 S.W.2d 716, 718 (Mo. 1962) (quoting Constitutional Convention of 1943-44 File No. 4, at 6). Indeed, it would pose a grave danger to the public if proponents could seek to spend public funds through ballot initiatives while keeping voters in the dark about the tax increases or offsetting spending cuts that would inevitably be needed to finance the new spending. The Medicaid Expansion Amendment poses just such a danger.

Fortunately, the Missouri courts stepped in, allowing the Amendment on the ballot only after finding that it did not appropriate money or alter the General Assembly's and Governor's constitutionally protected roles in the appropriations process. *Cady*, 606 S.W.3d at 665 ("[T]he Proposed Measure neither purported to appropriate existing funds nor implicated the Governor's role in the appropriation process. The circuit court also properly treated the Proposed Measure as an amendment to MO HealthNet's eligibility criteria, subject to the legislature's appropriation power."); *see also Cady v. Missouri Secretary of State*, No. 20AC-CC00209, 2020 WL 5093610, at *3 (Mo. Cir. June 04, 2020) ("[T]here is no language in the Initiative that appropriates existing funds or directs the legislature to do so. ... The Initiative does nothing to change how the General Assembly appropriates funds. ... The Initiative does nothing to change how the Governor may play a role in the appropriation process. ... The Initiative does not purport to appropriate existing funds nor does it implicate the Governor's role in the appropriation process.").

The Amendment thus leaves the actual funding of Medicaid expansion (if any) to the discretion of the General Assembly and Governor through the ordinary appropriations process—or as Justice Scalia once described it—the "hurly-burly, the give and take of the political process between the legislative and the executive." Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations,

94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel).

In the end, were this Court to allow the Medicaid Expansion Amendment to survive it would snatch from the General Assembly its constitutionally prescribed power to appropriate funds, and hand that power to anyone able to get a proposal through the initiative process, rendering Article III, Section 51 meaningless and undermining the separation of powers enshrined in Missouri's Constitution. For these reasons, the Court should affirm the lower court's ruling striking down the Medicaid Expansion Amendment.

CONCLUSION

For the foregoing reasons, FGA respectfully urges the Court to affirm the lower court's ruling striking down the Medicaid Expansion Amendment as unconstitutional in violation of Article III, Section 51 of the Missouri Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on July 7, 2021.

This brief complies with the limitations contained in Supreme Court Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,050, excluding the cover, signature block, and this certificate. The font is Times New Roman 13-point type. The electronic copies of this brief were scanned for viruses and found to be virus free. Pursuant to Rule 55.03, the undersigned further certifies the original of this brief has been signed by the undersigned.

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